Filed 7/22/19 Jackson v. City of San Diego CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUZETTE JACKSON, Plaintiff and Appellant, v. CITY OF SAN DIEGO, Defendant and Respondent.	D073416 (Super. Ct. No. 37-2017-00013047-CU-BT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Suzette Jackson, in pro. per., for Plaintiff and Appellant.

Mara W. Elliott, City Attorney, George Schaefer, Assistant City Attorney, and Jenny K. Goodman, Deputy City Attorney, for Defendant and Respondent.

Suzette and James Jackson sued the City of San Diego (City), seeking damages for the City's alleged wrongful conduct relating to the enforcement of code violations on their residential property. The City demurred based on its assertions the claims were barred by the Jacksons' failure to exhaust their administrative remedies and/or by a 90-

day statute of limitations applicable to a writ of administrative mandamus (Code Civ. Proc., § 1094.5).[1] The court sustained the demurrer without leave to amend, and entered judgment in the City's favor.

Suzette Jackson (Jackson) appeals. We conclude the court properly sustained the demurrer because the claims are barred by the judicial and administrative exhaustion doctrines. Additionally, Jackson has not met her appellate burden to show a reasonable possibility she could cure the pleading defects by an amendment. We thus affirm the judgment.

FACTUAL SUMMARY

We base our factual summary on the Jacksons' complaint, the incorporated documents, and matters that can be properly judicially noticed. (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1172-1173 (*McBride*).) We disregard facts set forth in the parties' appellate briefs that are based on sources outside this rule. We assume the truth of Jackson's alleged facts, unless they are contradicted by information in documents attached or referred to in the complaint. (*Ibid.*; *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044-1045.)

In July 2010, the City issued a Civil Penalty Notice and Order (2010 civil penalty order) to the Jacksons, stating their property violated numerous municipal codes pertaining to grading on the property without the required permits. (See San Diego Mun.

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1 All unspecified statutory references are to the Code of Civil Procedure.

Code, ch. 1, art. 2, div. 8.)[2] The violations included unauthorized grading impacting environmentally sensitive lands and biological resources, and improperly storing a recreational vehicle on the environmentally sensitive land. The order listed about 15 separate code violations. The order required the Jacksons "to correct the violations" by completing various actions, including ceasing all grading activities, submitting a plan for erosion control, and either restoring the property to its preexisting condition or submitting a plan for developing the property after obtaining a site development permit. The order stated the failure to correct the violations would result in specified monetary penalties, and that the failure to pay the required penalties "shall constitute a personal obligation and/or a lien upon the real property."

In October 2011, a City land development investigator sent the Jacksons a letter, stating they had not yet satisfied the requirements of the 2010 civil penalty order. The City gave the Jacksons additional time to remedy the violations, but warned they would be subject to additional enforcement actions if the code violations were not addressed.

On June 7, 2012, the City recorded a "NOTICE OF PENDING ADMINISTRATIVE ENFORCEMENT ACTION" on the property. This notice stated the Jacksons' property was subject to the 2010 civil penalty order, and the recording would remain until "the administrative enforcement action has been completed or all necessary corrections have been made and the property is in compliance with the Municipal Code sections related to the violations cited."

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2 All further references to the Municipal Code are to the San Diego Municipal Code.

Shortly after, on June 20, 2012, the City issued a "NOTICE OF VIOLATION" (2012 Notice of Violation), which (as detailed below) is an alternative method to enforce code violations. (See Mun. Code, § 12.1001 et seq.) This notice identified the various code violations, and contained specific deadlines to bring the property into compliance, including obtaining grading permits and restoring the environmentally sensitive lands that had been altered or disturbed.

In August 2012, the City Attorney's office sent the Jacksons a copy of the 2012 Notice of Violation, stating the matter had been referred to the City Attorney's office to ensure compliance.

The next year, in July 2013, the City recorded a document canceling the June 7, 2012 recorded Notice of Pending Administrative Action. In their complaint, the Jacksons alleged this cancellation was based on a determination that they had remedied the code violations and their "CASE is CLOSED."[3]

In October 2014, the City sent a letter to Mr. Jackson, asserting that the code violations continued to exist.

Ten months later, on August 28, 2015, the City mailed the Jacksons an "Intent to Record Notice of Violation" (Intent to Record notice), attaching the 2012 Notice of Violation. The notice was dated August 27, 2015, and stated in part:

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3 In moving for a demurrer and on appeal, the City argued the cancellation was based on the City's agreement to temporarily remove the recording to allow the Jacksons to refinance and obtain funds to remedy the violations. The City's assertions are unsupported by facts in the record, and are inconsistent with the applicable review standard requiring we assume the truth of all properly alleged facts.

> "The violations listed in the [2012] Notice of Violation . . . remain uncorrected. Therefore, as authorized by San Diego Municipal Code Section 12.1001, the City intends to record the Notice of Violation with the County Recorder. In addition to the Notice becoming public record, while such violations are uncorrected, the City may elect to withhold permits pertaining to the use and development of this property.
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> "**You have the right to appeal the City's decision to record this Notice by submitting a written appeal request to this office within ten (10) days of the postmarked date of this letter.** Your failure to appeal will constitute a waiver of your right to an administrative hearing and will not affect the validity of the recorded Notice of Violation.
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> "If you submit an appeal within the time allowed, an appeal hearing will be scheduled and you will be notified of the time, date and place. At that time, an appeal board or hearing officer will consider evidence and testimony to determine whether or not the recording of the Notice of Violation is appropriate. That decision will be the final administrative order and will become immediately effective."

The envelope was postmarked on August 28, 2015. The City also sent the letter by certified mail on August 31, 2015; the post office later returned the letter as unsigned.[4]

The tenth day after the August 28 letter's postmarked date fell on the Monday of Labor Day weekend (September 7). Two days later, on Wednesday September 9, the Jacksons delivered a handwritten document to the City stating that they "would like to file an appeal" of the Intent to Record notice, asserting that their property no longer

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[4] In response to our request for additional briefing, the City asked that we take judicial notice that the Intent to Record notice was also sent by certified mail and was returned unsigned. We grant this motion. (See Evid. Code, § 459, subd. (a) [appellate court may take judicial notice of a document even if document not presented in court below].)

violated the applicable codes and noting that in 2013 the City had canceled the prior recorded Notice of Administrative Violations.

There is no indication the City responded to the appeal or communicated with the Jacksons until about eight months later on May 5, 2016, when the City recorded the 2012 Notice of Violation. This recorded Notice of Violation stated:

> "Pursuant to the provisions of . . . Municipal Code Section 12.1003, the City . . . is hereby filing this notice . . . that the above identified real property . . . [¶] . . . [¶] is not in compliance with the provisions of the . . . Municipal Code. . . . [¶] This notice shall remain on record until all necessary corrections have been made and the property is in compliance with the Municipal Code sections related to the violations cited. In addition, as long as these violations exist, the City . . . may withhold permits for buildings, alteration, use or development of the property."

Seven months later, on August 18, 2016, the Jacksons filed a claims notice with the City, asserting that the May 5 recording of the 2012 Notice of Violation was unjustified because all conditions in the notice had been satisfied, as evidenced by the prior cancellation of recording. The Jacksons said the unjustified recording had caused them substantial monetary damages arising on May 6, 2016. The City denied the claim on October 17, 2016.

Eight months later, on April 12, 2017, the Jacksons (representing themselves) filed a 72-page (single-spaced) superior court complaint against the City and various City departments. The central thrust of the complaint was to seek compensatory and punitive damages for the City's actions in continuing to enforce the 2010 civil penalty order (including through the May 5, 2016 recorded 2012 Notice of Violations), despite that

these violations allegedly no longer existed. The Jacksons detailed the history of the City's efforts to enforce the 2010 code violations (as summarized above), alleged that expert reports showed there were no continuing violations, claimed the City was unevenly enforcing the applicable code sections as some of their neighbors were not subject to the same enforcement actions, and asserted that the City's 2013 cancellation of the Notice of Pending Administrative Enforcement showed it had determined the Jacksons were no longer in violation of the Municipal Code.

The Jacksons did not clearly identify the particular causes of action underlying their claims, but at various times used the terms negligence, intentional infliction of emotional distress, fraud, and harassment. They claimed there was no legal basis for the recorded 2012 Notice of Violation, and that the City erred in refusing to provide them with a hearing to challenge the 2012 Notice of Violation.

The City filed a demurrer, arguing the Jacksons' claims had no merit because: (1) they failed to exhaust their administrative remedies; and (2) the complaint was barred by the 90-day statute of limitations applicable to section 1094.5 mandamus actions.[5]

On the administrative exhaustion argument, the City asserted the Jacksons failed to exhaust their remedies because they did not file their administrative appeal within 10 days after August 27, 2015, the date on the City's Intent to Record notice. The City claimed that the Jacksons had until Tuesday September 8 to file an appeal (they said the

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5 The City also asserted the complaint "fails to state any viable cause of action," but it did not provide a separate legal argument on this ground.

10th day fell on a Sunday, and Monday was a holiday). The City thus argued the Jacksons' September 9 administrative appeal was untimely.

On the 90-day limitations period, the City argued that sections 1094.5 and 1085 are both governed by a 90-day statute of limitations, and therefore the Jacksons' challenges to the August 2015 Intent to Record notice and the May 5, 2016 recording of the Notice of Violation were time-barred because the complaint was not filed until April 12, 2017.

In support of these arguments, the City requested the court take judicial notice of several documents: (1) the 2010 civil penalty order; (2) the June 7, 2012 recorded Notice of Pending Administrative Enforcement Action and its later cancellation in July 2013; (3) the 2012 Notice of Violation; (4) the August 27, 2105 Intent to Record notice; and (5) the May 5, 2016 recorded 2012 Notice of Violation.

In their opposition brief, the Jacksons repeated many of the allegations that were contained in their complaint, and argued their administrative appeal was timely and that the City failed to comply with its "obligation to set an administrative hearing." (Capitalization omitted.) They also argued the City failed to meet and confer with them under rules governing demurrers.

After a hearing (that was not reported), the court rejected the meet and confer argument and sustained the demurrer without leave to amend. The court's order stated in part:

> "While [the Jacksons] assert at the hearing that they timely file[d] an appeal of the City's intent to record the [2012 Notice of Violation]

> based on the assertion that the time to appeal was 10 *business* days, [the Jacksons] are incorrect. [The Jacksons] had 10 calendar days to appeal the decision. . . . Further notwithstanding [the Jacksons'] assertions, [the Jacksons] do not provide any legal authority or evidence that the City authorized [the Jacksons] to file this action.
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> "Under . . . section 1094.6, judicial review of 'any decision of a local agency' may not be made . . . unless filed within 90 days 'the decision becomes final.' . . . The City notified Petitioners of its intent to record the [Notice of Violation] on August 27, 2015. This letter informed Petitioners of their right to appeal the decision within 10 days. [The Jacksons] did not timely appeal. Thus, the decision became final by at least mid-September of 2015. Petitioners did not file this petition until much more than 90 days later—April 12, 2017 [or] . . . within 90 days of the actual recording of the [Notice of Violation] (May 5, 2016)."

Mrs. Jackson appeals.[6]

DISCUSSION

I. *Demurrer Review Standard*

"When reviewing a judgment dismissing a complaint after a successful demurrer, we assume the complaint's properly pleaded or implied factual allegations are true, and we give the complaint a reasonable interpretation . . . ." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320 (*Campbell*).) We also consider judicially noticeable matters and documents incorporated into the complaint. (*Ibid.*; *McBride, supra,* 18 Cal.App.5th at pp. 1172-1173.) We review the complaint de novo to determine whether it states a claim for relief. (*McCall v. PacifiCare of California, Inc.*

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6 Although the appellant's brief identifies both spouses, Mrs. Jackson (who is self-represented on appeal) is the only party identified on the notice of appeal and she is the only signatory on the appellate brief. She cannot represent Mr. Jackson on appeal. (Bus. & Prof. Code, § 6125.) Thus, Mr. Jackson is not a proper appellant.

(2001) 25 Cal.4th 412, 415.) We must reverse if the complaint states a claim for relief under any legal theory. (*Ibid.*)

Additionally, an appellate court must reverse a judgment sustaining a demurrer if there is a reasonable possibility the defect can be cured by amendment. (*Campbell, supra,* 35 Cal.4th at p. 320.) The plaintiff has the burden of proving a reasonable possibility of curing a defect by amendment. (*Ibid.*; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44.) An appellant can meet this burden by identifying new facts or theories on appeal. (§ 472c, subd. (a); *Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460, 463-464; *King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1049, fn. 2.)

II. *Appellate Rules and Procedures*

A fundamental rule of appellate review is that an appealed judgment is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) " 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Ibid.*; see *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

To meet this burden, an appellant must designate an adequate record and submit briefing that provides the court with sufficient information to rule on the parties' appellate arguments. On the latter requirement, the appellant's brief must contain a clear and understandable summary of the relevant facts; state and explain each legal argument

under a separate heading; and provide relevant legal authority for each argument. (See Cal. Rules of Court, rule 8.204(a)(1)(C), (a)(2)(C).)

Jackson did not comply with these rules in her opening appellate brief. She did not include a coherent factual summary, nor did she identify or explain her legal arguments. Her brief consists mainly of excerpts of numerous state and federal court decisions, without explaining how these decisions apply to the facts of the case or to her claimed errors.

Based on Jackson's violations of these fundamental appellate rules, we have the discretion to find she has forfeited her appellate challenges. (See *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) In the interests of justice, we have nonetheless independently reviewed the record and requested supplemental briefing from both parties pertaining to issues not fully addressed in the initial briefing. After this independent review and examination of the supplemental briefing, we conclude Jackson has not established prejudicial error and thus the judgment must be affirmed.

III. *Summary of Applicable Municipal Code Provisions*

Under the Municipal Code, the City had a choice of several different methods to enforce its land development code. The method primarily at issue here is the City's decision to record a Notice of Violation, which can substantially burden the property owner's ability to sell or refinance the property and to obtain permits or development approvals.

A Notice of Violation may be issued "[w]henever a Director[7] determines that a violation of the Municipal Code" exists. (Mun. Code, § 12.0103.) The Notice must identify the violated code sections; describe the property's condition that violates the applicable codes; list the necessary corrections to bring the property into compliance; state a deadline to correct the violations; and reference the potential consequences if the property remains in violation. (See Mun. Code, § 12.0103, subds. (a)-(g).)

If the property remains in violation, the Director may *record* the Notice of Violation *after following specific steps*. (Mun. Code, § 12.1003.) First, "the Director shall provide to the [property owner] a letter stating that a Notice of Violation will be recorded *unless a written request to appeal pursuant to the procedures outlined in this Division is filed*. [¶] The letter shall be served pursuant to any of the methods of service set forth in Section 11.0301 of this Code." (Mun. Code, § 12.1003, subd. (b), italics added.)

The applicable appeal procedures state that a person "served with" "an intent to record a Notice of Violation" may "file an appeal *within ten (10) calendar days from the service of the . . . notice[]*." (Mun. Code, § 12.0501, subd. (a), italics added.) "The purpose of the [appeal] hearing is for the . . . property owner to state any reasons why a Notice of Violation should not be recorded." (Mun. Code, § 12.1005, subd. (b).) If there was no appeal or if there was an appeal and the Enforcement Hearing Officer affirms the

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7 A "Director" is defined as "the City Manager or any Department Director[] . . . , and any of their designated agents or representatives." (Mun. Code, § 11.0210.)

Director's decision, "the Director may record the Notice of Violation if the violations remain." (Mun. Code, §§ 12.1003, subd. (c), 12.1006, subd. (c).) "The failure of any person to file an appeal in accordance with these provisions shall constitute a waiver of the right to an administrative hearing and shall not affect the validity of the recorded Notice of Violation." (Mun. Code, § 12.1005, subd. (c).)

Once a Notice of Violation is recorded, a property owner can trigger a cancellation by filing a written request for a Notice of Compliance. (Mun. Code, § 12.1007, subd. (a).) The Director must reinspect the property and serve a Notice of Compliance if the owner has corrected the violations and paid the applicable penalties and fines. (Mun. Code, § 12.1007, subds. (b), (c).)

IV. *Analysis*

In their complaint, the Jacksons sought compensatory and punitive damages for the City's alleged wrongful conduct in identifying code violations on their property and in issuing and recording the 2012 Notice of Violation, allegedly without justification. As explained below, these claims are barred by the judicial and administrative exhaustion doctrines, and Jackson has not met her burden to show she can amend the complaint to state a viable cause of action.

A. *Judicial Exhaustion Doctrine*[8]

The predicate underlying each of the Jacksons' claims is that the City erred in its administrative determination that they had violated the identified codes and thus the City had wrongfully recorded the 2012 Notice of Violation reflecting the code violations.

Under the judicial exhaustion doctrine, a party is barred from contradicting a fact found by an administrative tribunal *unless* it has first successfully challenged the administrative determination by a writ of ordinary mandamus under section 1085 or a writ of administrative mandamus under section 1094.5 (whichever is appropriate under the particular circumstances). (See *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867 (*Murray*).) Under this doctrine, "[u]nless the administrative decision is [successfully] challenged, it binds the parties on the issues litigated and if those issues are fatal to a civil suit, the plaintiff cannot state a viable cause of action." (*Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 243 (*Knickerbocker*).)

This judicial exhaustion rule is a form of collateral estoppel. (See *Murray, supra,* 50 Cal.4th at p. 867; *Knickerbocker, supra,* 199 Cal.App.3d at pp. 241-244; see also *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 81 (conc. opn. of Werdegar, J.).) "Exhaustion of judicial relief simply means that if [a plaintiff] wishes to attack the administrative determination [the plaintiff] must launch that assault in an administrative mandamus proceeding and not in a lawsuit for damages." (*Knickerbocker,* at pp. 243-

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8 Although the City did not assert this theory in moving for a demurrer or on appeal, we can properly address it on appeal because it presents solely a legal issue and we provided both parties the opportunity to brief the issue in supplemental briefs.

244; see *Ahmadi-Kashani v. Regents of University of California* (2008) 159 Cal.App.4th 449, 461.) This rule applies where, as here, there was no administrative hearing because the public entity found the litigant failed to properly exercise his or her right to a formal hearing. (See *Murray*, at p. 878.)

On our review of the Jacksons' lengthy complaint, the Jacksons did not assert, or attempt to assert, a writ of mandate cause of action in their pleading. The Jacksons did not identify the applicable code sections (§§ 1085, 1094.5), mention a request for administrative writ relief, or request the court to overturn the administrative findings. Instead the focus of their complaint was to recover *damages* for the City's alleged wrongful conduct. In their "PRAYER FOR JUDGMENT," they sought $432,000 in compensatory damages and about $1.3 million in punitive damages (which are not recoverable against a public entity, see Gov. Code, § 818). They argued their appeal was improperly denied on timeliness grounds, but challenged the denial and "fairness" of the administrative appeals process only in the context of requesting the court to order the City to change its general rules and procedures in the future.

On this record, the recorded Notice of Violation was binding on the Jacksons, and cannot serve as the basis for a damages action. (Mun. Code, § 12.1005, subd. (c).) By failing to successfully overturn the City's administrative findings through a traditional or

administrative writ (§§ 1085, 1094.5), the Jacksons cannot prevail on their claims for damages asserted in their superior court complaint.[9]

B. *Administrative Exhaustion Doctrine*

The Jacksons' causes of action also fail because they did not exhaust their administrative remedies. The administrative exhaustion doctrine bars a judicial remedy by a person to whom administrative remedies were available but who failed to properly invoke those remedies in the administrative process. (See *Campbell, supra,* 35 Cal.4th at pp. 321-322; *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 528.) If an administrative remedy is provided by statute or ordinance, " ' "relief must be sought from the administrative body and this remedy exhausted before the courts will act." [Citation.] The rule is a jurisdictional prerequisite in the sense that it "is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts . . . and binding upon all courts." ' " (*Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 184 (*Clews Land*).) The purpose of the doctrine is to promote judicial economy and afford due respect to the administrative process. (See *Campbell,* at p. 322; *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 748.)

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9 Further, as explained in part V below, Jackson cannot successfully amend the complaint to add a viable mandamus claim because a section 1094.5 cause of action would be barred by the 90-day statute of limitations (§ 1094.6), and there are no facts supporting section 1085 relief.

" 'Consideration of whether such exhaustion has occurred in a given case will depend upon the procedures applicable to the public agency in question.' " (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 591 (*Tahoe Vista*); see *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1450.) A party who fails to appeal an administrative action "in the manner prescribed by the town code" has failed to exhaust administrative remedies. (*Park Area*, at p. 1450; see *Clews Land, supra*, 19 Cal.App.5th at p. 187.)

Here, the administrative appeal procedures were provided in the Municipal Code sections pertaining to the "Recordation of Notices of Violation" (ch. 1, art. 2, div. 10) and "Administrative Enforcement Appeals" (ch. 1, art. 2, div. 5). Those procedures require a property owner who wishes to challenge the recording of a Notice of Violation to file an appeal "within ten (10) calendar days from the service of the . . . [¶] . . . [¶] . . . letter . . . indicating an intent to record a Notice of Violation." (Mun. Code, §§ 12.0501, subd. (a); 12.1003, subd. (b); 12.1005, subd. (a).) Absent a timely appeal, the City has the authority to record a Notice of Violation, and that decision cannot be later challenged. (See Mun. Code, § 12.1005.)

The Jacksons argue that they did timely appeal the Intent to Record notice by delivering a written appeal letter to the City on September 9, 2015. The City counters that this appeal was untimely because the undisputed facts show it was filed one day late, i.e., more than 10 days after August 28, when the City first mailed the Intent to Record notice to the Jacksons.

After reviewing these arguments and examining the record, we asked the parties to file supplemental briefs on the issues of when the City "served" the letter on the Jacksons and whether the "service" is the trigger date for the 10-day appeal period.

In response, the City acknowledged the Municipal Code provides that "service" of the letter starts the 10-day appeal period, and that the applicable service rules are contained in Municipal Code section 11.0301. (See Mun. Code, § 12.0501, subd. (a)(3).) We agree. Under the Municipal Code, an intent to record letter "*shall* be served pursuant to any of the methods of service set forth in Section 11.0301 of this Code" (Mun. Code, § 12.1003, subd. (b), italics added), and the Municipal Code defines "shall" to mean "mandatory" (*id.*, § 11.0209 subd. (b)).

The relevant service rules contained in Municipal Code section 11.0301 are:

> "(a) Whenever a notice is required to be given under the Municipal Code for enforcement purposes, the notice shall be served by any of the following methods unless different provisions are otherwise specifically stated to apply:
>
> "(1) Personal service; or
>
> "(2) *Certified mail, postage prepaid, return receipt requested. Simultaneously, the same notice may be sent by regular mail. If a notice that is sent by certified mail is returned unsigned, then service shall be deemed effective pursuant to regular mail, provided the notice that was sent by regular mail is not returned.*
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> "(3) Posting the notice conspicuously on or in front of the property. The form of the posted notice shall be approved by the City Manager.
>
> "(b) *Service by certified or regular mail in the manner described above shall be effective on the date of mailing*." (Italics added.)

Under these rules, the Jacksons' administrative appeal was untimely because the Jacksons hand-delivered their appeal to the City more than 10 days after the Intent to Record notice was served. Based on the Jacksons' own documentation, the City mailed the Jacksons the Intent to Record notice document on August 28, 2015. Additionally, we have taken judicial notice of the fact that the City sent this document by certified mail on August 31, 2015, and that this certified letter was returned unsigned. (See fn. 4, *ante*.) Under Municipal Code section 11.0301, "If a notice that is sent by certified mail is returned unsigned, then service shall be deemed effective pursuant to regular mail, provided the notice that was sent by regular mail is not returned." (Mun. Code, § 11.0301, subd. (a)(2).) There is no allegation in the record that the letter sent by regular mail was returned. To the contrary, the Jacksons admit they received this letter.

Accordingly, under these facts, "service" was "deemed effective pursuant to regular mail" on the date of the mailing, which was August 28, 2015. The Intent to Record notice is dated August 27, 2015, and the envelope (submitted by the Jacksons) was postmarked on August 28, 2015. The letter stated: "**You have the right to appeal the City's decision to record this Notice by submitting a written appeal request to this office within ten (10) days of the postmarked date of this letter.** Your failure to appeal will constitute a waiver of your right to an administrative hearing and will not affect the validity of the recorded Notice of Violation."

Under these admitted facts, the 10-day appeal period expired on the Monday of the Labor Day weekend (September 7). Therefore, the Jacksons had one additional day, until

Tuesday, September 8, to file their appeal. However, they waited to file their appeal until the next day, Wednesday, September 9. By filing the appeal late, the Jacksons were no longer entitled to a hearing and failed to exhaust their administrative remedies.

There are no facts in the record to support an exception to the administrative exhaustion doctrine, such as under the equitable estoppel rules or a substantial compliance theory. Thus, under settled law, the Jacksons cannot recover on their damages claims because they did not exhaust their administrative remedies by timely seeking relief in an available administrative forum. Without the benefit of an administrative hearing on the Jacksons' claims that the asserted code violations no longer existed, a court cannot rule on those claims for the first time. Requiring litigants to timely exhaust administrative remedies before seeking court intervention avoids "end-runs" around legislatively formed administrative bodies that have the particular expertise to rule on the issues. (*Tahoe Vista*, *supra*, 81 Cal.App.4th at p. 594.)

In her reply brief, Jackson challenges the conclusion that her appeal was untimely on various grounds. First, she argues that the City's letter did not start the time period because the City failed to include a preprinted appeal form. This argument is unavailing because there are no rules requiring the City to include a preprinted form with the Intent to Record notice. Second, she relies on a City information bulletin referring to "business days." This reliance is misplaced because the bulletin does not govern appeals pertaining to the recording or intended recording of a Notice of Violation. Third, she argues her due process rights were violated because she was not given adequate notice of the 10-day

period and that this rule is "vague." This argument is unavailing because the Municipal Code clearly states the "ten (10) *calendar-days*" rule (Mun. Code, § 12.0501, subd. (a)), and the Intent to Record notice, which she admits receiving, clearly (and in bold print) identified a "ten (10) days" deadline.

V. *Leave to Amend*

An appellate court must reverse a judgment sustaining a demurrer if there is a reasonable possibility the defect can be cured by amendment. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) An appellant has the burden to show she can amend the complaint to remedy the deficiencies in the existing complaint. (*Savea v. YRC, Inc.* (2019) 34 Cal.App.5th 173, 178.) To meet this burden, the appellant must " ' " 'clearly and specifically set forth . . . [the] factual allegations' " ' " that will establish a viable cause of action. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 559; accord, *Aghaji v. Bank of America, N.A.* (2016) 247 Cal.App.4th 1110, 1118-1119; *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1504.)

Jackson has not met this burden. She has not identified any new factual allegations she could add to the complaint to overcome the City's judicial and administrative exhaustion defenses or otherwise establish a viable cause of action.

For example, any attempt to add a section 1094.5 mandamus cause of action would fail because it would be time-barred under the 90-day limitations rule. (See § 1094.6.) The Jacksons filed their complaint on April 2017, more than 90 days after the

City made its challenged administrative decisions pertaining to the code violations (at the latest in August 2015 or May 2016). Contrary to Jackson's contention, the fact that the City denied the Jacksons' damages administrative claim notice in October 2016 did not toll the limitations period for filing a mandamus action or otherwise establish that the tort claims were viable.

Likewise, section 1085 is inapplicable because there are no facts showing the City failed to comply with a ministerial duty. (See *Environmental Protection Information Center, Inc. v. Maxxam Corp.* (1992) 4 Cal.App.4th 1373, 1380.) " 'Generally, . . . section 1085 may only be employed to compel the performance of a duty which is purely ministerial in character. [Citation.] [¶] A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. . . .' [Citation.] 'Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner, only to compel it to exercise its discretion in some manner.' " (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1020.)

In this case, Jackson has not identified any facts showing the City failed to comply with a ministerial duty.

DISPOSITION

Judgment affirmed. The parties are to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.